The Honorable Robert S. Lasnik

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RAJU A.T. DAHLSTROM, Plaintiff, v. UNITED STATES, *et al.*, Defendants.	CASE NO. 2:16-cv-01874-RSL UNITED STATES' MOTION TO DISMISS UNDER FED. R. CIV. P. 12(b)(1) Noted for Consideration on: October 6, 2017

I. INTRODUCTION

Plaintiff files this wrongful termination action against the United States pursuant to the Federal Tort Claims Act ("FTCA") after his employment with the Sauk-Suiattle Indian Tribe (the "Tribe") was terminated in December 2015. Plaintiff seeks to hold the United States liable for the employment actions of the Tribe, as well as the actions of the Tribe's Chief of Police, Richard McDonnell, who allegedly detained and escorted Plaintiff from the reservation.[1]

Plaintiff's claims against the United States must fail. First, the United States has not waived sovereign immunity for tort claims relating to the Tribe's employment decisions. Such decisions

[1] The United States has filed a Notice of Substitution for any tort claims alleged against Defendant Richard McDonnell, but not for purposes of any *Bivens* or constitutional claims against Mr. McDonnell. Dkt. 37.

UNITED STATES ATTORNEY
700 STEWART STREET, SUITE 5220
SEATTLE, WASHINGTON 98101
(206) 553-7970

remain part of the Tribe's self-governance and are not encompassed by a federal contract or agreement under the Indian Self-Determination and Education Assistance Act of 1975, as amended ("ISDA"). Second, even if the Tribe's actions are encompassed by a federal contract or agreement, the claims are barred by the discretionary function exception to the FTCA. Discretionary decisions made by federal employees acting within the scope of their employment, even if allegedly negligent, are protected if they are susceptible to public policy considerations. It is well-established that hiring, retaining, supervision and training decisions involve weighing public policy considerations and fall squarely within the discretionary function exception. Either way, the United States has not waived sovereign immunity for the claims asserted by Plaintiff and the United States should be dismissed from this action for lack of subject matter jurisdiction.

Additionally, Plaintiff's intentional tort claims against the United States are barred by § 2680(h) of the FTCA. Plaintiff alleges that the Tribe's actions constitute abuse of process, but this claim is expressly excepted from the FTCA by § 2680(h). Plaintiff also claims that the Tribe's Chief of Police restricted him from freely leaving an office space and then escorted him off the reservation. Plaintiff alleges these actions by the Chief of Police constitute false arrest, false imprisonment and negligent infliction of emotional distress. However, false arrest and false imprisonment are expressly excepted from the FTCA by § 2680(h), the law enforcement "exception to the exception" does not apply here, and any claims "arising from" this conduct, including negligent infliction of emotional distress, are also barred. Thus, this Court lacks subject matter jurisdiction over the United States pursuant to the FTCA and Plaintiff's claims against the United States should be dismissed.

II. RELEVANT FACTS

Plaintiff filed an Amended Complaint in the United States District Court on August 14, 2017, alleging various tort claims against the United States, and members of the Sauk-Suiattle Tribal

UNITED STATES ATTORNEY
700 STEWART STREET, SUITE 5220
SEATTLE, WASHINGTON 98101
(206) 553-7970

Council relating to the termination of his employment in December 2015 as Director of Health and Social Services for the Tribe. Dkt. 33 at ¶ 4. The claims against the United States include wrongful discharge in violation of public policy, intentional infliction of emotional distress, negligent supervision or training, outrage, abuse of process and violation of the FTCA. *Id.* at pp. 38-43. While not alleged in a specific count, Plaintiff also asserts that the Tribe's Chief of Police subjected him to false arrest, false imprisonment and negligent infliction of emotional distress. *Id.* at p. 7, ¶ 25. Plaintiff brings his tort claims against the United States under the FTCA. *Id.* at ¶ 4.

III. STANDARD OF REVIEW

A. Motion to Dismiss under Rule 12(b)(1)

Dismissal is appropriate under Fed. R. Civ. P. 12(b)(1) when a court lacks subject matter jurisdiction over the claim. Subject matter jurisdiction is a threshold issue that goes to the court's power to hear the case. *Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 94-95 (1998). A motion to dismiss for lack of subject matter jurisdiction can attack the allegations either facially or factually. *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). A moving party factually attacks the allegations by "disput[ing] the truth of the allegations that, by themselves, would otherwise invoke federal jurisdiction." *Id.* A moving party facially attacks the allegations by asserting "that allegations contained in the complaint are insufficient on their face to invoke federal jurisdiction." *Id.* In a factual attack, the court is not limited to the allegations in the complaint, but may consider affidavits or any other evidence outside of the pleadings, even if it requires the court to resolve factual disputes. *Id.*, *see also Ass'n of Am. Medical Colleges v. United States*, 217 F.3d 770, 778 (9th Cir. 2000). Here, Plaintiff's claims are facially insufficient to invoke federal jurisdiction because the United States has not waived sovereign immunity for claims arising from a Tribe's employment decisions. Plaintiff's claims are also factually insufficient to sustain intentional tort

UNITED STATES ATTORNEY
700 STEWART STREET, SUITE 5220
SEATTLE, WASHINGTON 98101
(206) 553-7970

claims against the United States for Mr. McDonnell's actions because he was not acting as a federal law enforcement officer enforcing federal law at the time of the allegations and therefore, intentional tort claims are barred by § 2680(h) of the FTCA. Once challenged, the party opposing a motion to dismiss must furnish evidence necessary to satisfy its burden of establishing subject matter jurisdiction. *Id*.

B. FTCA and the Indian Self-Determination and Education Assistance Act

The United States, as sovereign, is immune from suit unless it consents to be sued. *United States v. Mitchell*, 445 U.S. 535, 538 (1980); *see also Cato v. United States*, 70 F.3d 1103, 1107 (9th Cir. 1995). The FTCA is a limited waiver of sovereign immunity that permits claims to be brought against the United States for the "negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment." 28 U.S.C. § 1346(b)(1). Any waiver of that immunity must be strictly construed in favor of the United States. *United States v. Nordic Vill., Inc.*, 503 U.S. 30, 33-34 (1992); *Jerves v. United States*, 966 F.2d 517, 521 (9th Cir. 1992).

The ISDA, as amended, provides that "any civil action or proceeding" against "any tribe, tribal organization, Indian contractor or tribal employee" involving claims resulting from the performance of a "contract, grant agreement, or any other agreement or compact" authorized by the ISDA "shall be deemed an action against the United States" and "be afforded the full protection and coverage of the Federal Tort Claims Act." Pub. L. No. 101-121 § 315, 103 Stat. 701, 744 (1989); Pub. L. No. 101-512, Title III, § 314, 104 Stat. 1915, 1959-60 (1990). This provision is known as § 314 and the contracts entered into between tribal organizations and the federal government are known as "638 contracts" because it is authorized by Pub.L. No. 93-638. Section 314 is an extension of the United States' waiver of sovereign immunity under the FTCA, but only for cognizable tort

UNITED STATES ATTORNEY
700 STEWART STREET, SUITE 5220
SEATTLE, WASHINGTON 98101
(206) 553-7970

claims under the FTCA. *Snyder v. Navajo Nation*, 382 F.3d 892, 897 (9th Cir. 2004)("Congress did not intend section 314 to provide a remedy against the United States in civil actions unrelated to the FTCA."). Section 314 does not affect the United States' sovereignty for alleged violations of constitutional rights by federal employees. *See* 28 U.S.C. § 2679(b)(2)(A)(The FTCA "does not extend or apply to a civil action against an employee of the Government . . . which is brought for a violation of the Constitution of the United States."); *Arnsberg v. United States*, 757 F.2d 971, 980 (9th Cir. 1985)("*Bivens* does not provide a means of cutting through the sovereign immunity of the United States itself.").

Not every agreement between a tribal organization and the federal government triggers the protection of § 314. For § 314 protection to apply, the liability-causing event must occur while a tribal employee is "acting within the scope of their employment in carrying out the contract or agreement." *Shirk v. U.S. ex rel. Dep't of Interior*, 773 F.3d 999, 1003 (9th Cir. 2014). The Ninth Circuit in *Shirk* described a two-part test for analyzing whether the actions of a tribe, tribal organization or Indian contractor come within the ambit of § 314. *Id.* at 1006. Because the plaintiff bears the burden of establishing subject matter jurisdiction, the plaintiff must identify which contractual provisions of a 638 contract or agreement the alleged tortfeasor was carrying out at the time of the tort. *Id.* The first step of the analysis is to determine whether "the alleged activity is, in fact, encompassed by the relevant federal contract or agreement." *Id.* "The scope of the agreement defines the relevant 'employment' for purposes of the scope of employment analysis at step two." *Id.* The second inquiry then is whether "the allegedly tortious action falls within the scope of the tortfeasor's employment under state law." *Id.* "[A] plaintiff's failure at either step is sufficient to defeat subject matter jurisdiction." *Id.*

UNITED STATES ATTORNEY
700 STEWART STREET, SUITE 5220
SEATTLE, WASHINGTON 98101
(206) 553-7970

In this case, Plaintiff has simply asserted that the actions of the Tribe come within the ambit of § 314 and therefore, the United States is liable for his wrongful termination. However, Plaintiff must first meet his burden of establishing that the Court has subject matter jurisdiction by demonstrating that the Tribe or a tribal employee was executing contractual obligations under a 638 contract or other federal agreement and that their tortious conduct falls within the scope of their responsibilities under the relevant contract or agreement. If Plaintiff fails to meet this burden, then the Court lacks subject matter jurisdiction over the United States.

On the other hand, § 314 is triggered and tribal law enforcement officers are considered federal employees for FTCA purposes when tribal law enforcement functions are funded and performed pursuant to a 638 contract as authorized by 25 U.S.C. § 450f. Although § 314 extends FTCA liability for tribal employees carrying out contractual obligations pursuant to a 638 contract or other federal agreement, that extension includes all of the exceptions to liability described in the FTCA. Of particular relevance in this case, § 2680(a) of the FTCA carves out an exception to liability based upon the exercise or failure to exercise or perform discretionary functions or duties. 28 U.S.C. § 2680(a). The FTCA also retains governmental immunity for claims arising out of certain enumerated intentional torts, including "assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights." 28 U.S.C. § 2680(h). Each exception to the FTCA must be strictly construed in favor of the United States. *Saraw Partnership v. United States*, 67 F.3d 567, 569 (5th Cir. 1995); *Sheehan v. United States*, 896 F.2d 1168, 1170 (1990) ("[there] is no justification for this Court [or any court] to read exemptions into the [Federal Tort Claims] Act beyond those provided by Congress.").

There is also an "exception to the exception." *Tekle v. United States*, 511 F.3d 839, 851 n.9 (9th Cir. 2007). Section 2680(h) allows intentional tort claims for the acts or omissions of

UNITED STATES ATTORNEY
700 STEWART STREET, SUITE 5220
SEATTLE, WASHINGTON 98101
(206) 553-7970

"investigative or law enforcement officers of the United States Government." 28 U.S.C. § 2680(h). An "investigative or law enforcement officer" means "any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law." *Id.*

However, tribal law enforcement officers are not "federal law enforcement officers" for purposes of the FTCA unless the officer is commissioned by the Secretary of the Interior with a Special Law Enforcement Commission ("SLEC") under the Indian Law Enforcement Reform Act, 25 U.S.C. § 2804, and is enforcing federal law at the time of the activity at issue. *See Dry v. United States*, 235 F.3d 1249 (10th Cir. 2000)(tribal officers were acting under authority inherent to the Tribe's sovereignty, enforcing tribal criminal laws against tribal members, and were not investigative or law enforcement officers for purposes of the FTCA); *Hebert v. United States*, 438 F.3d 483 (5th Cir. 2006)(tribal police officers who were not employed by the BIA, acting pursuant to an SLEC, or enforcing federal law, could not be considered "investigative or law enforcement officers of the United States government" for purposes of the FTCA); *Locke v. United States*, 215 F.Supp.2d 1033 (D.S.D. 2002), *aff'd*, 63 Fed.Appx. 971 (8th Cir. 2003); *Black v. United States*, 2013 WL 5214189 at *3 (W.D. Wash. Sept. 17, 2013)(tribal police officer is not a "federal law enforcement officer" for purposes of the FTCA unless the officer was acting pursuant to an SLEC and enforcing federal law).

Thus, intentional torts committed by the Tribe's Chief of Police, in the course of performing law enforcement functions pursuant to a 638 contract, are barred by § 2680(h) unless the Chief of Police possesses an SLEC and was enforcing federal law as part of the tortious conduct.

IV. ARGUMENT

Plaintiff's claims against the United States should be dismissed for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1) because the United States has not waived its

UNITED STATES ATTORNEY
700 STEWART STREET, SUITE 5220
SEATTLE, WASHINGTON 98101
(206) 553-7970

sovereign immunity for the claims asserted by Plaintiff. The Tribe's employment decisions are an act of self-governance and not encompassed by a federal contract or agreement, as such the United States is not liable. But even if Plaintiff can establish that § 314 protection is triggered, the Tribe's employment decisions are subject to the discretionary function exception of the FTCA and the United States is not liable for these actions. Additionally, the United States is not liable for intentional torts committed by federal employees, including the Tribe's Chief of Police, who does not possess an SLEC and was not enforcing federal law in escorting Plaintiff off the reservation at the direction of a Tribal Council member.

A. Plaintiff has Failed to Establish that the Tribe's Decision to Terminate His Employment is an Activity Encompassed by a 638 Contract or Other ISDA Agreement

Plaintiff alleges that the United States is liable for torts committed by members of the Tribe, Tribal Council and Tribal Administration relating to the termination of his employment. Dkt. 33 at p. 5, ¶ 14; p. 18, ¶¶ 61-62. However, in order to establish subject matter jurisdiction, Plaintiff must prove that the activity he complains of, the termination of his employment, is encompassed by a 638 contract or other ISDA agreement. *Shirk*, 773 F.3d at 1006. He then must prove that the tortious activity falls within the scope of the tortfeasor's employment under Washington law. *Id.* Absent proof that the Tribe or a tribal employee was carrying out a contractual obligation and acting within the scope of responsibilities under the relevant contract, the activity does not come within the ambit of § 314 and the United States has not waived sovereign immunity for such claims.

In accordance with *Shirk*, the threshold question for this Court is whether the alleged activity of the Tribe is within the ambit of § 314, thereby subjecting the United States to liability. 773 F.3d at 1003. "An employee's conduct is covered by the FTCA if, while executing his contractual obligations under the relevant federal contract, his allegedly tortious conduct falls within the scope

UNITED STATES ATTORNEY
700 STEWART STREET, SUITE 5220
SEATTLE, WASHINGTON 98101
(206) 553-7970

of employment as defined by state law." *Id.* at 1005. In order to make this determination, this Court needs to know what the relevant employment is as defined by the federal contract in order to decide whether the actions fall within the scope of employment. *Id.* at 1006. Then the Court must determine whether the tortious action falls within the scope of employment. *Id*.

Here, Plaintiff has failed to identify the contractual provision that the Tribe or a tribal employee was carrying out and how that activity was within the scope of responsibilities under the relevant contract. Plaintiff generally asserts that the Tribe entered into an ISDA Annual Funding Agreement with Indian Health Services, within the United States Department of Health and Human Services, to operate a tribal medical clinic and other health and social services; and states that in his role as Director of Health and Social Services, he implemented the requirements of that contract. Dkt. 33 at pp. 7-8, ¶ 26. He then asserts that he complained to the Tribe's Chief Financial Officer about improper dental payments and unsafe vaccines. *Id.* at pp. 8-9, ¶¶ 29-31. Plaintiff next asserts, without any specifics, that "[t]he next day and as a direct result of Plaintiff (and co-workers) oral complaint filed with CFO Crail, Plaintiff was placed on a retaliatory 'paid administrative leave,' by Defendant Metcalf with [sic] legal justification." *Id.* at p. 9, ¶ 33. Plaintiff does not provide any additional information about the ISDA contract(s), the relevant provisions of the contract(s) that he or other tribal employees were carrying out, or how the termination of his employment relates to a federal contractual obligation such that the Tribe or other tribal employees' actions come within the ambit of § 314 and expose the United States to liability.

The United States disputes that the Tribe's governance actions or employment decisions in this case are encompassed by any 638 contract or federal agreement. It is well-established that both Indian tribes and the federal government are committed to the goal of promoting tribal self-government. *See e.g. New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334 (1983). Indian

UNITED STATES ATTORNEY
700 STEWART STREET, SUITE 5220
SEATTLE, WASHINGTON 98101
(206) 553-7970

tribes are sovereign political entities, who retain attributes of inherent sovereignty not divested by Congress, including the authority to regulate economic activity within their own territory. *N.L.R.B. v. Pueblo of San Juan*, 276 F.3d 1186, 1192-93 (10th Cir. 2002); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 148, n. 14 (1982). "A tribe may regulate, through taxation, licensing, or other means, the activities of non-members who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Pueblo*, 276 F.3d at 1192-93, *quoting Montana v. United States*, 450 U.S. 544, 565-66 (1981). It follows that a tribe retains the inherent authority to regulate employment contracts and make personnel decisions for employees employed on the reservation, particularly for executive roles such as that held by Plaintiff prior to his termination. Before the Court can assume jurisdiction over matters touching on the Tribe's power to regulate employment activities within the reservation, Plaintiff must demonstrate that, in terminating his employment, the Tribe or a tribal employee was carrying out an obligation of a 638 contract or other ISDA agreement. Unless and until Plaintiff meets this burden, this Court lacks subject matter jurisdiction and Plaintiff's Amended Complaint must be dismissed as to the United States.

Plaintiff asserts in paragraphs 15-25 of his Amended Complaint, and the United States does not dispute, that the Tribe entered into a 638 contract for the provision of law enforcement services that was in effect during the time of the incidents in this lawsuit. Further, the United States does not dispute that § 314 protection is triggered for Richard McDonnell, the Tribe's Chief of Police, who was acting within the scope of employment in performing law enforcement services under the 638 contract in the course of the allegations relating to Mr. McDonnell's conduct in Plaintiff's Amended Complaint. However, for the reasons described herein, § 2680(h) of the FTCA bars Plaintiff's allegations relating to Mr. McDonnell's tortious conduct. Further, Plaintiff does not allege that Mr. McDonnell was involved in the Tribe's decision to terminate his employment, so the fact that a 638

UNITED STATES ATTORNEY
700 STEWART STREET, SUITE 5220
SEATTLE, WASHINGTON 98101
(206) 553-7970

contract for law enforcement services exists, has no bearing on whether the Court has jurisdiction over the Tribe's decision to terminate Plaintiff's employment as Director of Health and Social Services. This Court still lacks subject matter jurisdiction over the United States for Plaintiff's claims regarding the decision to terminate his employment pursuant to *Shirk*, unless Plaintiff establishes that the Tribe's employment decisions are encompassed by a 638 contract or other ISDA agreement.

B. Even if Encompassed by an ISDA contract, Plaintiff's Claims Against the United States are Barred by the Discretionary Function Exception to the FTCA

Even if Plaintiff could establish that the Tribe's actions in terminating Plaintiff are covered by a 638 contract or other ISDA agreement, the United States is immune from suit under the discretionary function exception to the FTCA. The discretionary function exception reasserts the government's immunity for claims:

> based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

28 U.S.C. § 2680(a); *see also Chadd v. United States*, 794 F.3d 1104, 1108 (9th Cir. 2015) (explaining that the exception is designed to "prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort."), *cert. denied*, 136 S. Ct. 2008 (2016). The exception applies regardless of whether a government agent was negligent in the exercise of duties, so long as the duties are discretionary. *Kennewick Irrigation District v. United States*, 880 F.2d 1018, 1029 (9th Cir. 1989). The exception restores the government's immunity in situations where its employees are carrying out governmental or regulatory duties. *Blackburn v. United States*, 100 F.3d 1426, 1428 (9th Cir. 1996). Because the waiver of sovereign immunity is jurisdictional, a court lacks subject matter jurisdiction over a claim

UNITED STATES ATTORNEY
700 STEWART STREET, SUITE 5220
SEATTLE, WASHINGTON 98101
(206) 553-7970

that falls within the discretionary function exception. *GATX/Airlog Co. v. United States*, 286 F.3d 1168, 1173 (9th Cir. 2002).

The Supreme Court set forth a two-part test to govern application of the discretionary function exception in *Berkovitz v. United States*, 486 U.S. 531, 536 (1988). The test requires a court to examine first, whether the government's actions involve an element of judgment or choice. *Id.* Second, the inquiry proceeds to determine whether the judgment is of the kind that the discretionary function exception was designed to shield, namely, one based on considerations of public policy. *See Chadd*, 794 F.3d at 1109; *Olson v. United States*, 362 F.3d 1236, 1239 (9th Cir. 2004); *United States v. Gaubert*, 499 U.S. 315, 322 (1991). If both conditions are met, then the discretionary function exception applies and sovereign immunity precludes suit. *Sydnes v. United States*, 523 F.3d 1179, 1183 (10th Cir. 2008).

Employment decisions are "precisely the types of administrative action the discretionary function exception seeks to shield." *Sydnes*, 523 F.3d at 1185-86. "A federal agency's decision to terminate or request the termination of an employee involves an element of choice and is the kind of decision that implicates policy concerns relating to accomplishing the agency's mission." *Id.* at 1186. In *Sydnes*, the 10th Circuit considered a factually analogous case in which two employees of a government contractor brought tort claims against the United States and the government contractor alleging wrongful termination. 523 F.3d 1179. The two plaintiffs claimed they were fired in retaliation for reporting alleged security breaches. *Id.* at 1182. They asserted claims against the United States for wrongful discharge in violation of public policy, "extreme and outrageous conduct," and civil conspiracy. *Id.* The court applied the *Berkovitz* two-part discretionary function analysis and held that the discretionary function exception to the FTCA barred the plaintiffs' claims

UNITED STATES ATTORNEY
700 STEWART STREET, SUITE 5220
SEATTLE, WASHINGTON 98101
(206) 553-7970

in their entirety, including their claim for extreme and outrageous conduct, which was predicated upon their termination. *Id.* at 1186 and fn. 6.

In analyzing the first prong of the discretionary function analysis, the *Sydnes* court found that plaintiffs could not point to a federal statute, regulation or policy that limited the federal employee's discretion to terminate them. *Id.* at 1184. Plaintiffs attempted to argue certain motivations for firing an employee are categorically impermissible and therefore not a matter of discretion. *Id.* But, the court rejected this argument, pointing out that a state law, proscribing firing an at-will employee for a reason that violates public policy, does not waive the federal government's sovereign immunity. *Id.* The court noted that, "[c]onsidering state tort law as a limit on the federal government's discretion at the jurisdictional stage impermissibly conflates the merits of plaintiffs' claims with the question whether the United States has conferred jurisdiction on the courts to hear those claims in the first place." *Id.* Because plaintiffs could not point to a federal statute, regulation or policy that limited the federal employee's decision to terminate them, plaintiffs failed to satisfy the first prong of the *Berkovitz* analysis.

As to the second prong, the *Sydnes* court determined that employment and termination decisions require "consideration of a wide range of policy factors, including 'budgetary constraints, public perception, economic conditions, individual backgrounds, office diversity, experience and employer intuition.'" *Id.* at 1186, *quoting Burkhart v. Washington Metro. Area Transit Auth.,* 112 F.3d 1207, 1217 (D.C.Cir. 1997); *and citing Tonelli v. United States,* 60 F.3d 492, 496 (8th Cir. 1995). The court reasoned that requiring the government to defend its employment decisions at the jurisdictional stage would eviscerate the benefits of sovereign immunity, one of which is protection from suit, including the burden of discovery. *Sydnes,* 523 F.3d at 1186.

UNITED STATES ATTORNEY
700 STEWART STREET, SUITE 5220
SEATTLE, WASHINGTON 98101
(206) 553-7970

Plaintiff's claims are analogous to those in *Sydnes* and the claims are barred in their entirety for the same reasons. In this case, the challenged conduct is the Tribe's decision to terminate Plaintiff's employment. Plaintiff alleges that the motivation for his termination was impermissible and violated public policy. Similar to the plaintiffs in *Sydnes*, Plaintiff asserts claims against the United States for wrongful discharge in violation of public policy, intentional infliction of emotional distress and outrage,[2] negligence, abuse of process and violation of the FTCA. Dkt. 33 at pp. 38-43. Because these claims are all predicated upon the same underlying conduct, the claims are all subject to the same discretionary function analysis.

To overcome the discretionary function exception, Plaintiff must first show that the Tribe's discretion to terminate him was limited by "a federal statute, regulation, or policy." *Berkovitz*, 486 U.S. at 536. States cannot waive the federal government's immunity, so state tort law, such as wrongful discharge in violation of public policy, cannot limit a federal employee's discretion. *See Sydnes*, 523 F.3d at 1184.

With respect to the first prong of the *Berkovitz* analysis, there are no mandatory regulations or policies that the Tribe was required to follow in making decisions pertaining to hiring, retaining, supervising or training employees such as Plaintiff. The Tribe has complete discretion to determine how to handle tribal personnel issues. *See* Exhibit A attached hereto, *Sauk-Suiattle Indian Tribe Employee Handbook* at pp. 7, 9 (employment is at-will and tribe may terminate employment at any time, with or without cause, subject to applicable law). Decisions about staffing and employment in tribal executive management, and ultimately whether a person is suited for a given position, involves

[2] In Washington State, the torts of outrage and intentional infliction of emotional distress are identical. *See Kloepfel v. Bokor*, 149 Wn. 2d 192, 194 (2003)(the two causes of action are "synonyms for the same tort."); *Robel v. Roundup Corp.*, 148 Wn.2d 35, 51, Fn. 7 ("outrage encompasses causes of action based on reckless and intentional conduct.").

UNITED STATES ATTORNEY
700 STEWART STREET, SUITE 5220
SEATTLE, WASHINGTON 98101
(206) 553-7970

an element of choice and is not directly and specifically controlled by a federal statute, regulation or policy. Plaintiff concedes in his Amended Complaint that he was an "at-will" employee. Dkt. 33 at p. 28, ¶ 93. The Tribe's decision to terminate Plaintiff's employment and the manner in which his termination was handled involves the Tribe's choice and judgment.

Like the plaintiffs in *Sydnes*, Plaintiff here asserts that the Tribe's motivations for firing him, his purported refusal to prepare fraudulent invoices and whistleblowing activities relating to medical vaccines, are constrained by Washington's law proscribing the firing of an at-will employee for any reason that violates public policy. However, before the Court can reach the issue of whether these allegations are true, the Court must find an applicable waiver of sovereign immunity. *Sydnes*, 523 F.3d at 1184. States cannot waive the federal government's immunity, thus Plaintiff must show that the Tribe's discretion in terminating him was limited by a *federal* statute, regulation or policy. *Id*.; *see also Daigle v. Shell Oil Co.*, 972 F.2d 1527, 1539 (10th Cir. 1992)(holding plaintiffs must cite specific regulations the government is alleged to have violated). Plaintiff has not done so and, as such, he fails to meet the first prong of *Berkovitz*.

As to the second prong of the *Berkovitz* analysis, courts have repeatedly held that employment decisions, including hiring, retaining, supervision and training fall squarely within the discretionary function exception. *See e.g. Sydnes*, 523 F.3d at 1185-86; *Nurse v. United States*, 226 F.3d 996, 1001 (9th Cir. 2000)(decisions regarding employment, training and supervision of customs agents protected); *Burkhart*, 112 F.3d at 1217 (hiring, training, and supervision of public transportation personnel protected); *Daisley v. Riggs Bank, N.A.*, 372 F.Supp.2d 61, 81-82 (D.D.C. 2005) (decisions regarding how much training should be given to guards and embassy employees protected).

UNITED STATES ATTORNEY
700 STEWART STREET, SUITE 5220
SEATTLE, WASHINGTON 98101
(206) 553-7970

The Tribe's decision to terminate Plaintiff is precisely the type of conduct that is grounded in policy-decisions, including the Tribe's ability to determine what types of individuals are best suited to hold executive positions serving the tribal community, such as the Director of Health and Social Services. These decisions are specific to the Tribe's considerations of an individual's experience, the needs of the tribe, personalities, budgetary and other mission-oriented determinations that involve the exercise of policy judgment. These types of decisions fall squarely within the discretionary function exception.

Similarly, decisions about the nature and extent of training or supervision required of tribal employees involve policy judgments of the type intended to be shielded by the discretionary function exception. In Count IV, Plaintiff claims that the United States failed to properly train its employees to conduct investigations to ensure the protection of Plaintiff's due process and constitutional rights. Dkt. 33 at p. 40, ¶¶ 132-136. While Plaintiff makes a bare assertion unsupported by any facts, a decision about how much training to provide employees in order to ensure the protection of Plaintiff's rights, is one courts have traditionally left to the federal agency and have found that it is protected by the discretionary function exception. *See e.g. Kelly v. United States*, 241 F.3d 755, 763 (9th Cir. 2001)(holding Forest Service's decision not to require certain training of its pilots is protected by the discretionary function exception); *Nurse*, 226 F.3d at 1001 (concluding that alleged negligent and reckless training "fall[s] squarely within the discretionary function exception"); *Doe v. Holy See*, 557 F.3d 1066, 1084 (9th Cir. 2009) ("[T]he decision of whether and how to retain and supervise an employee is the type of discretionary judgment that the exclusion was designed to protect.").

Consequently, even if Plaintiff is able to establish that the Tribe's actions are encompassed by a 638 contract or ISDA agreement, the discretionary function exception in § 2680(a) of the FTCA

UNITED STATES ATTORNEY
700 STEWART STREET, SUITE 5220
SEATTLE, WASHINGTON 98101
(206) 553-7970

bars all of Plaintiff's claims relating to the termination of his employment by the Tribe. The United States has not waived sovereign immunity for employment claims.

C. The Court Lacks Subject Matter Jurisdiction Over Tort Claims Arising Out of the Exceptions Listed in 28 U.S.C. § 2680(h).

Plaintiff's intentional tort claims against the United States are barred by 28 U.S.C. § 2680(h). In § 2680(h), Congress carved out an exception to the government's waiver of sovereign immunity. Section 2680(h) provides that the FTCA shall not apply to "[a]ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights." 28 U.S.C. § 2680(h). Each exception to the FTCA must be strictly construed in favor of the United States. *Saraw*, 67 F.3d at 569.

1. Abuse of Process is Barred by § 2680(h)

In Count VI, Plaintiff asserts claims against the United States for abuse of process. Dkt. 33 at p. 41, ¶¶ 140-142. Plaintiff asserts that the Tribe perpetrated a retaliatory fraud by placing him on extended paid administrative leave, rather than allowing him to use vacation or sick leave, in order to silence his complaints about the condition of the tribe's medical vaccines. *Id.* Since this claim is based upon the Tribe's discretionary decision to terminate Plaintiff's employment, this claim should be barred for the reasons set forth in the preceding sections. However, even if Plaintiff could avoid the discretionary function bar, Count VI must be dismissed as an intentional tort expressly excepted from the FTCA in § 2680(h). The United States has not waived its sovereign immunity for a claim of abuse of process, and this Court lacks subject matter jurisdiction to hear it. Accordingly, this claim should be dismissed with prejudice as to the United States pursuant Fed. R. Civ. P. 12(b)(1).

//

//

UNITED STATES ATTORNEY
700 STEWART STREET, SUITE 5220
SEATTLE, WASHINGTON 98101
(206) 553-7970

2. False Arrest, False Imprisonment and Negligent Infliction of Emotional Distress are Barred by § 2680(h)

While not addressed in a specific count, Plaintiff asserts, in paragraph 25, claims against the Tribe's Chief of Police for false arrest, false imprisonment and negligent infliction of emotional distress. Dkt. 33 at p. 7, ¶ 25. Richard McDonnell was the Chief of Police for the Sauk-Suiattle Police Department at all times relevant to the allegations in this matter. *See* Dkt. 37. As alleged by Plaintiff and admitted by the United States, the Tribe entered into a 638 contract with the BIA which provided funds for law enforcement services, including the Tribe's police department. The contract was in effect during the time periods alleged in Plaintiff's Amended Complaint. Therefore, as a tribal law enforcement officer, Mr. McDonnell is deemed a federal employee of the BIA for purposes of the FTCA and the United States has filed a notice of substitution as the real party in interest for purposes of the common law tort claims against Mr. McDonnell.

Plaintiff's claims against Mr. McDonnell are barred by the intentional tort exception to the FTCA. Section 2680(h) expressly bars claims for false arrest and false imprisonment, as well as claims "arising out of" these intentional torts, unless the tortfeasor is an "investigative or law enforcement officer of the United States government," and is enforcing federal law. 28 U.S.C. § 2680(h); *see also Dry*, 235 F.3d 1249; *Hebert*, 438 F.3d 483; *Locke*, 215 F.Supp.2d 1033; *Black*, 2013 WL 5214189 at *3.

Plaintiff does not allege that Mr. McDonnell was commissioned as a federal law enforcement officer by the Secretary of the Interior, possessed an SLEC, or was acting under color of federal law when he allegedly detained and expelled Plaintiff from the reservation. Indeed no SLEC has been issued to Mr. McDonnell. *See* Declaration of Jerin Falcon ("Falcon Decl.") attached as Exhibit B hereto. Special Agent in Charge Falcon has testified that the BIA only issues SLECs to tribal law

UNITED STATES ATTORNEY
700 STEWART STREET, SUITE 5220
SEATTLE, WASHINGTON 98101
(206) 553-7970

enforcement officers when the employing tribe has signed a memorandum of agreement with the BIA. *Id.* at ¶ 7. Special Agent in Charge Falcon further testified that the Sauk-Suiattle Tribe did not have a memorandum of agreement in place at the time of the events in this litigation and Mr. McDonnell did not have an SLEC issued by the BIA. *Id.* at ¶¶ 10-11.

Additionally, Plaintiff asserts that Mr. McDonnell was ordered by Defendant Ronda Metcalf, the Tribe's General Manager, to detain Plaintiff and escort him from the reservation. Dkt. 33 at p. 7, ¶¶ 23-24. Plaintiff does not claim that Mr. McDonnell was authorized to or was enforcing federal law when he acted upon Ms. Metcalf's direction to escort him from the reservation. As such, Mr. McDonnell is not a federal law enforcement officer for purposes of the exception to § 2680(h) and § 2680(h) bars Plaintiff's intentional tort claims against the United States arising from Mr. McDonnell's actions.[3]

Section 2680(h) also bars Plaintiff's claims against the United States for negligent infliction of emotional distress as a claim "arising out of" Mr. McDonnell's actions relating to false imprisonment and/or false arrest. While not excluded as a matter of law from the FTCA by § 2680(h), courts must look "beyond the party's characterization to the conduct upon which the claim is based" to determine whether conduct relied upon constitutes a specifically excluded tort. *Snow-Erlin v. United States*, 470 F.3d 804, 808 (9th Cir. 2006). "Regardless of the plaintiff's characterization of the cause of action, 28 U.S.C. § 2680(h) bars suit for claims based on conduct which constitutes one of the excepted torts, ..." *Sheehan*, 896 F.2d at 1171, *amended by Sheehan*

[3] Plaintiff generally avers in paragraphs 17-20 of the Amended Complaint that Defendant Patrick Roberts was carrying out law enforcement duties during the time the alleged torts were committed, but Plaintiff fails to specify any actions taken by Mr. Roberts that constitute torts. However, the same analysis would apply to Mr. Roberts, who does not have an SLEC either, and § 2680(h) would bar any claims for intentional torts committed by Mr. Roberts in his law enforcement capacity.

UNITED STATES ATTORNEY
700 STEWART STREET, SUITE 5220
SEATTLE, WASHINGTON 98101
(206) 553-7970

v. United States, 917 F.2d 424 (9th Cir. 1990)). The focus of this inquiry is whether conduct that constitutes an enumerated tort is "essential" to a plaintiff's claim. *Sabow v. United States*, 93 F.3d 1445, 1456 (9th Cir. 1996).

There are no allegations against Mr. McDonnell in Plaintiff's Amended Complaint other than "preventing [Plaintiff] from leaving the work environment" and expelling Plaintiff from the reservation at Ms. Metcalf's direction. *See* Dkt. 33 at pp. 17-18, ¶¶ 58-59 and 35-36, ¶¶ 116-117, fn. 34. Plaintiff does not allege that Mr. McDonnell had any role in the Tribe's decision to terminate him. Thus, Plaintiff's claim of negligent infliction of emotional distress against Mr. McDonnell must "arise out of" Plaintiff's alleged unlawful detention and expulsion from the reservation. As such, § 2680(h) bars Plaintiff's claim.

Even if Plaintiff could avoid the FTCA's intentional tort bar for his negligent infliction of emotional distress claim, it still fails under Washington law. In Washington, a plaintiff may not base claims of negligence on intentional actions such as false arrest. *See e.g. Lawson v. City of Seattle*, 2014 WL 1593350, at *13 (W.D. Wash. Apr. 21, 2014) (granting summary judgment on a negligent infliction of emotional distress claim predicated on the intentional acts underlying the plaintiff's false arrest claim); *St. Michelle v. Robinson*, 759 P.2d 467, 470 (1988) ("[T]he abuse was an intentional act, and the resulting emotional distress was also intentionally inflicted as a matter of law. Therefore, St. Michelle cannot state a cause of action for the negligent infliction of emotional distress."); *see also Willard v. City of Everett*, 2013 WL 4759064, at *2 (W.D. Wash. Sept. 4, 2013) ("A plaintiff may not base a claim of negligence on an intentional act, like the use of excessive force."); *Nix v. Bauer*, 2007 WL 686506, at *4 (W.D. Wash. Mar. 1, 2007) ("[A]llegations of intentional conduct cannot support a claim of negligence.") (*citing Bolyes v. Kennewick*, 813 P.2d 178 (1991)). Plaintiff's claim of negligent infliction of emotional distress is predicated upon Mr.

UNITED STATES ATTORNEY
700 STEWART STREET, SUITE 5220
SEATTLE, WASHINGTON 98101
(206) 553-7970

McDonnell's intentional conduct underlying the false arrest and false imprisonment claims. Therefore, this claim is not cognizable under Washington law or the FTCA and should be dismissed.[4]

IV. CONCLUSION

Plaintiff's claims against the United States should be dismissed. Plaintiff's claims of wrongful termination do not relate to contractual obligations under the ISDA and the United States has not waived sovereign immunity for these claims. Even if Plaintiff's claims are deemed to be the actions of federal employees under a 638 contract or other federal agreement, employment decisions are barred by the discretionary function exception to the FTCA. Either way, Plaintiff cannot maintain an action against the United States for the Tribe's employment decisions. Additionally, Plaintiff's intentional tort claims for abuse of process, false arrest, false imprisonment and negligent infliction of emotional distress are barred by the exceptions in § 2680(h) of the FTCA and/or not cognizable under Washington law.

//

//

//

//

//

[4] It does not appear from the Amended Complaint that Plaintiff asserts that Mr. McDonnell's actions constitute intentional infliction of emotional distress or outrage. However, even if Plaintiff did make such an assertion, his claims fail as a matter of law because in Washington, "[t]he law intervenes only where the distress inflicted is so severe that no reasonable person could be expected to endure it." *Saldivar v. Momah*, 186 P.3d 1117, 1130 (2008), *as amended* (July 15, 2008). As such, any claim for intentional infliction of emotional distress must be predicated on behavior "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Kloepfel*, *supra*, 66 P.3d at 632. Plaintiff's allegations, even if true, do not rise to the level of necessary severity to constitute extreme and outrageous behavior.

UNITED STATES ATTORNEY
700 STEWART STREET, SUITE 5220
SEATTLE, WASHINGTON 98101
(206) 553-7970

DATED this 1st day of September, 2017.

Respectfully submitted,

ANNETTE L. HAYES
United States Attorney

s/ *Tricia Boerger*

TRICIA BOERGER, WSBA #38581
Assistant United States Attorney
United States Attorney's Office
700 Stewart Street, Suite 5220
Seattle, Washington 98101-1271
Phone: 206-553-7970
Fax: 206-553-4067
Email: tricia.boerger@usdoj.gov

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is an employee in the Office of the United States Attorney for the Western District of Washington and is a person of such age and discretion as to be competent to serve papers;

It is further certified that on September 1, 2017, I electronically filed said pleading with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following CM/ECF participant(s):

Richard L. Pope, Jr.	rp98007@gmail.com
Jack W. Fiander	towtnuklaw@msn.com

I further certify that on September 1, 2017, I mailed by United States Postal Service said pleading to the following non-CM/ECF participant(s)/CM/ECF participant(s), addressed as follows:

-0-

Dated this 1st day of September, 2017.

/Julene Delo
JULENE DELO, Legal Assistnat
United States Attorney's Office
700 Stewart Street, Suite 5220
Seattle, Washington 98101-1271
Phone: 206-553-7970
Fax: 206-553-4067
Email: julene.delo@usdoj.gov